TEKITAL SDN BHD A

v.

AUTO PARKING INC SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: S1-22-609-2006]
29 APRIL 2011

CONTRACT: *Agreement - Agreement operating car park - Breach - Default in payments - Whether payments were guaranteed monthly payments - Whether payments contingent only if profits were made* C

EVIDENCE: *Adverse inference - Failure to call material witness - Whether presumption arose - Evidence Act 1950, s. 114(g)* D

The plaintiff was in a business of automatic parking system and the defendant was in the operation of car park business. Both parties entered into two agreements namely the STC agreement and the CSM agreement in respect of the operation of car parks at Selangor Turf Club and Menara CSM respectively. In E consideration of the plaintiff providing the working capital according to the said agreements, the defendant agreed to pay the plaintiff a guaranteed monthly payment of RM15,000 per month and RM7,250 per month respectively. The defendant subsequently defaulted in payments. In response to demand notices from the F plaintiff, the defendant forwarded to the plaintiff three post-dated cheques for the total amount due to the plaintiff. However, two of the cheques were dishonoured. The plaintiff obtained a judgment for the sum of RM84,250 against the defendant on the two dishonoured cheques with interest at the rate of 80% per G annum totaling RM105,762 to be paid by defendant to the plaintiff within 30 day. The defendant paid the first instalment of RM52,881 but stopped payment on the 2nd instalment of RM52,881. Hence, the plaintiff's claim herein. As the defendant was wound up after the current suit started, the defendant H obtained the sanction of the Director General of Insolvency ('DGI') to defend the suit. The defendant argued, *inter alia*, (i) that the payments to the plaintiff were made only when the defendant was making profit for the two car parks in Subang Turf Club and in Menara CSM (ii) that the plaintiff had full knowledge I of the cessation of the car park business and (iii) that the said

agreements were investment agreements and the returns would be dependent on the profits generated and according to a profit sharing ratio.

Held (allowing the plaintiff's claim with costs):

(1) There was not a single piece of document, not even in the correspondence between the parties stating that the payments would only be contingent if there were profits from the car parking business operation. It was clearly an afterthought. (para 23)

(2) It was imperative that the chief executive director of the defendant should have been called to give evidence on the defendant's behalf. He was one of the two parties that had discussed and finalised the terms of the said agreements and therefore clearly knew the intention of the parties. He had instructed the subsequent payments to the plaintiff and had issued the various letters to the plaintiff requesting for extension of time to pay. Although he was a bankrupt, there were no restrictions on him to give evidence in court. It followed that this was a fit case for the court to invoke s. 114(g) of the Evidence Act 1950. (paras 31, 34, 35, 37-39)

(3) From the defendant's conduct in paying the guaranteed payments, it was estopped from contending that payments would be made only when there was profit. The defendant had admitted to the plaintiff's claim as to the amount due by forwarding the three post-dated cheques. Further, it was never pleaded in the defendant's statement of defence that it needed to pay the monthly payment only if there was profit. If it was such an important term that would be a complete defence to the plaintiff's claim, the defendant would have surely pleaded it in clear unmistakable language. (paras 58-60)

(4) In the absence of any evidence showing that the defendant had informed the plaintiff that it had ceased operation of the Subang Turf Club car park, the plaintiff's claim would be allowed on the guaranteed payment of RM15, 000 per month until October 2009 but not beyond the date of the winding-up order against the defendant. As for Menara CSM, the plaintiff's claim would be allowed on RM7,250 per month until

August 2009 by which time both parties agreed that the building had been demolished for redevelopment. (paras 47 & 51)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor [1988] 1 LNS 161 SC ***(refd)***

Foo Sey Koh & Ors v. Chua Seng Seng & Ors [1985] 1 LNS 66 HC ***(refd)***

Majlis Amanah Ra'ayat v. The Official Receiver, Malaysia [1984] 1 CLJ 76; [1984] 1 CLJ (Rep) 240 FC ***(refd)***

Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 10 CLJ 491 HC ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

Other source(s) referred to:

Sarkar's Law of Evidence, 14th edn, 1993, vol 2, p 1548

For the plaintiff - Muralidharan Balan Pillai (Premshangar Venugopal with him); M/s Lewis & Co

For the defendant - Dhanraj Vasudevan (Kalai Selvi PM Muthu with him); M/s Kamil Hashim Pury & Lim

Reported by Anesa Karisma

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] Businessmen and companies seal their arrangements and agreements with sometimes just a mere handshake; other times by both parties signing a simple 1-page letter addressed by one to the other and at other times still, documents running into hundreds of pages with schedules and annexures and signed with common seal after resolutions have been passed in cases involving companies. In the case before this court, the agreements were prepared very simply and scantily, with expressions less than elegant; in a one-page agreement in a letter form in one instance and in another instance a four-page agreement.

[2] When a dispute should arise as it did here, the court would have to interpret the agreements within its four walls having regard to the circumstances of the case and the conduct of the parties both when the agreements were conceived and when they were concluded and continuing with the parties' conduct when carrying out the terms of the contracts.

Parties

[3] The plaintiff represented by its director and shareholder, Mr Carlo Allaria, had in its business dealings met with the defendant represented by Dato' Edison D'Cruz, a director and the chief executive officer of the defendant. The plaintiff was in the business of automatic parking system and the defendant, as its name suggests, was in the operation of car parks business.

[4] The two of them clicked; the defendant wanted some investors in its business as it was experiencing some cash flow problems. The plaintiff being a specialist in this business was looking for business opportunities in this area.

[5] They entered into two agreements: the STC agreement dated 25 August 2003 ("STC agreement") and the CSM agreement dated 5 January 2004 ("CSM agreement") in respect of the operation of car parks at the Selangor Turf Club and Menara CSM respectively. CSM is the acronym for Cold Storage Malaysia. The STC agreement was a four-page agreement and the CSM agreement a one-page letter signed by both parties.

Problem

[6] In consideration of the plaintiff providing working capital pursuant to the STC agreement and the CSM agreement, the defendant agreed to pay the plaintiff a guaranteed monthly payment of RM15,000 per month and RM7,250 per month respectively.

[7] The plaintiff effected payments and forwarded the refundable working capital pursuant to the STC agreement and CSM agreement in the sum of RM210,000 and RM174,000 respectively.

[8] Like most business relationships, it started well with the defendant making the monthly guaranteed payments as they fall due. The plaintiff was paid by the defendant for the period

October 2003-May 2005 under the STC Agreement (p. 66-77 bundle B) and for the period January 2004-June 2005 under the CSM agreement (pp. 37-64 bundle B); bundle B being the agreed bundle of documents.

[9] However by the second half of 2005 the defendant began defaulting in payments for both the STC agreement and CSM agreement by failing to pay the plaintiff the guaranteed monthly payments or the respective profits, whichever is the higher, as provided in both the agreements.

[10] By solicitor's letter dated 5 December 2005, the plaintiff demanded for payment of the sum of RM126,250 being the outstanding due as at November, 2005.

[11] By letter dated 4 January 2006, the defendant forwarded to the plaintiff's solicitor three post-dated cheques totalling RM126,250. The letter was received by the plaintiff's solicitors on a without prejudice basis since the cheques were post-dated.

[12] The first cheque dated 19 January 2006 for sum of RM42,000 was cleared while the remaining two cheques totaling RM84,250 were dishonoured. Due notices of dishonor were given to the defendant.

[13] Subsequent demand letters were sent by the plaintiff through its solicitors to the defendant.

[14] The defendant replied by various letters informing the plaintiff that it will settle the outstanding payments. Though the plaintiff failed in the summary judgment application in the High Court, on appeal, the Court of Appeal pursuant to an order dated 2 September 2009 ordered judgment for the sum of RM84,250 on the dishonoured cheques together with interest at the rate of 8% per annum totaling RM105,762 to be paid by the defendant to the plaintiff within 30 days from the date of the order.

[15] The defendant paid the first instalment of RM52,881. The defendant stopped payment on the cheque for 2nd instalment of RM52,881.

Prayers

[16] The plaintiff in its statement of claim dated 26 June 2006 prayed for the following:

A (a) for an order declaring that the directors and/or agents of the plaintiff be allowed to inspect and verify the accounts and other related documents in respect of the STC agreement and the CSM agreement;

B (b) the sum of RM217,750.00 and continuing;

(c) interests at the rate of 8% per annum and continuing from the respective due dates until the date of realization;

(d) costs.

C

[17] The particulars for the sum of RM217,750 are derived as follows:

(a) STC Agreement from December 2005 - May 2006	RM 90,000.00
D (b) CSM Agreement from December 2005 - May 2006	RM 43,500.00
(c) Dishonoured cheques	RM 84,250.00
E	RM217,750.00

Parol Evidence

F **[18]** At the outset it must be stated that the defendant had been wound up on 18 November 2009 by AmBank (M) Berhad *vide* Company (Winding Up) No. D13-28-585-2009. This suit, commenced before the winding up order, had been continued with leave of the Director General of Insolvency and of the court as G well. The defendant meanwhile had obtained the sanction of the Director General of Insolvency to defend this suit. The plaintiff, even if it succeeds, will not have priority over any other unsecured creditors and indeed the scheme of priorities under s. 292 of the Companies Act 1965 applies equally to the plaintiff as an H unsecured creditor.

[19] The plaintiff had also withdrawn prayer a) for the inspection of the defendant's accounts and other related documents with respect to the STC agreements and the CSM agreements and I rightly so because the defendant being in liquidation, the accounts and related documents would be under the purview of the Director General of Insolvency.

Whether The Defence As Pleaded Is Wide Enough To Cover The Stand Taken By The Defendant Now Which Is That The Payment Is Only If The Defendant Makes Profits

[20] At the crux and core of the defence of the defendant by way of parol evidence is the defendant's refusal to pay the minimum payments as stated in the two agreements on the ground that the defendant had understood the payments to continue only for so long as the plaintiff was making a profit for the two car parks in STC and Menara CSM.

[21] Is the defendant's defence wide enough to cover the stand taken by defendant pertaining to the payment only if there is profit? The only relevant paragraphs of the defence filed are paras. 3 and 5 which stated that the STC agreement and the Menara CSM were vague and not specific and thus unenforceable. The other paragraph is para. 7 of the defence which stated that the defendant was not authorised to give the profit guarantee under the two agreements and thus the two agreements are illegal and unenforceable. The remaining paragraphs of the defence consisted of bare denials.

[22] I find that the conduct of the defendant in making the payments to the plaintiff under the STC agreement (pp. 66-77 bundle B) and CSM agreement (p. 37-65 bundle B) and subsequently forwarding the three post-dated cheques (p. 19 bundle B) clearly confirmed the intention of the parties as stated by the plaintiff's sole witness, PW1 Mr Carlo Alliara.

[23] As clearly stated by the plaintiff's counsel, Mr Muralidharan, there was not a single piece of document, not even in the correspondence between the parties, stating that the payments would be contingent on only if there are profits. It is clearly an after-thought.

[24] It is trite law that the court cannot take into consideration what is not pleaded. In the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330, the Supreme Court, speaking through his Lordship Gunn Chit Tuan SCJ (as he then was) in setting aside the order of the High Court in dismissing the plaintiff's claim as the High Court had made a decision on an issue which was not raised by the parties in their pleadings, said at p. 333:

A ... and reference was made to *Janagi v. Ong Boon Kait* in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of Courts to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned Judge in that case in which His Lordship stated:

B

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

C

D

[25] It was also further reiterated by the Supreme Court at p. 155:

E We would point out that this Court has recently once again stressed the importance of pleadings in *Muniandy & Anor vs Muhammad Abdul Kader & Ors* in which Mohamad Azmi SCJ stated at p. 418 that:

> F Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 at p. 233:
>
> G Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating of what his answer to it is ...

H

Whether The Evidence As Adduced Allow The Defendant To Contend That The Payment Is Only If The Defendant Makes Profit

[26] Even by giving the defendant some latitude, the contents of I the two agreements and the conduct of the defendant are not consistent with the contention of the defendant that it need only pay when there is profit. In cl. (c) at p. 3 of the STC agreement it was stated:

The **profit guarantee** for the Project shall be RM180,000.00 per annum or 25% of the profits whichever is higher. (emphasis added)

[27] As for the Menara CSM, though only a 1-page agreement dated 5 January 2004 on the defendant's letterhead addressed to the plaintiff and signed by Dato' Edison D'Cruz as the chief executive officer of the defendant and Mr Carlo Allaria as director of the plaintiff, the terms were clear (p. 5 of bundle B):

It is agreed as follows:

Agreement between Auto Parking Inc. Sdn Bhd and Tekital Sdn Bhd for the management of Menara CSM carpark from 1 January 2004:

Total outlay		= RM174,000.00
Minimum Net Profit		= RM 14,500.00
Profit Ratio	Auto Parking	= 50%
	Tekital	= 50%(RM7,250.00)"

[28] I agree with the plaintiff's contention that had the parties wanted to make the payments to be conditional and contingent on profits, be it of the defendant or of the car park project, there would have been no necessity of stating in clause (c) of the STC agreement "... or 25% of the profits whichever is the higher." As for the Menara CSM agreement the expression used is "minimum net profit". In months when there are no profits, the higher of the two modes of calculating the payments due the plaintiff would be the profit guarantee for the project of RM7,250 per month as testified by plaintiff's witness PW1, Mr Carlo Allaria. I accept PW1's evidence that the same terms that govern the STC agreement (4-page agreement) would govern the 1-page Menara CSM agreement as the STC agreement had been in operation smoothly since 28 August 2003.

[29] The defendant's sole witness DW1, Sarina binti Kamaludin, a director of the defendant, had testified that the defendant's company shall pay the profit to the plaintiff only if the defendant company make profit. The proper person to testify on this would have been Dato' Edison D' Cruz, the director who negotiated the two agreements and signed the two agreements on behalf of the defendant. When asked why then did she continue to make payments to the plaintiff, her answer was that Dato' Edison

D'Cruz had instructed her to do so as Mr Carlo Allaria was a friend that there was the STC agreement that had been signed. DW2 admitted that she was not there at the time when negotiations on the two agreements took place.

[30] I draw guidance from the case of *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarious George Fernandez & Anor* [1988] 1 LNS 161; [1988] 1 MLJ 35 in assessing the credibility of a witness whose evidence is not consistent with documentary evidence. In the above case his Lordship Wan Hamzah SCJ observed at p. 37:

> We would respectfully agree with the soundness of the observation made in *Amagas Ltd v. Mundogas SA (the Ocean Frosts)* which reads:
>
> > It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motive, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.
>
> In commercial cases there is usually a substantial body of contemporary documentary evidence. This is not strictly speaking a commercial case, but the relevancy of the contemporaneous documents nevertheless holds true.

[31] From the evidence of the plaintiff's witness, PW1 Carlo and the defendant's witness DW1 Sarina, it is abundantly clear that the two parties who had discussed and finalised the terms of the STC agreement and CSM agreement were Mr Carlo himself and Dato' Edison D' Cruz. Only these two parties knew clearly the intention of the parties, if at all the words used were not clear.

[32] In fact DW1 Sarina at question 9 of the her witness statement DWS1 clearly states that:

> ... As much as I do not want to make these payments to him but because Dato Edison's instructions, I had no choice but made out those payments.

[33] Again at p. 50 of notes of evidence, when it was put to Sarina by the plaintiff's counsel that only Edison D' Cruz knew the intention of parties to the STC agreement and CSM agreement and so he instructed payments to the plaintiff and the answer by Sarina was "AGREE".

[34] It is all the more imperative that Dato' Edison D'Cruz should have been called by the defendant to give evidence on its behalf. This is a fit case for the court to invoke s. 114(g) of the Evidence Act 1950 which states:

> ... the Court may presume that the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.

[35] Illustration (g) provides:

> that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

[36] The learned author of *Sarkar's Law of Evidence* 14th edn, 1993, vol. 2 at p. 1548 observed as follows:

> Everything is to be presumed against a party who keeps his adversary out of the possession of the evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of case ... When a party failed to call as his witness the principal person involved and who was in a position to give firsthand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference ...

[37] When asked by the court as to why the defendant was not calling Dato' Edison D'Cruz as its witness, it was stated from the bar by the defendant's counsel, Mr Dhanraj Vasudevan, that the said Dato' Edison D'Cruz is now a bankrupt and in any event he was not a material witness.

[38] This court must state that a bankrupt has every right to come to court to give evidence, whether it be on behalf of a company or on its own behalf. A bankrupt is no less a person compared to one who is not a bankrupt. A bankrupt is of course subject to certain restrictions as his affairs now come under the purview of the Director General of Insolvency. A bankrupt can, as it were, forward all calls by creditors to him, to the Director General of Insolvency for all payments to creditors have to come from the amount realised by the Director General of Insolvency. However there is no restriction on a bankrupt giving evidence in court.

[39] If Dato' Edison was not a material witness, then DW1, Sarina binti Kamaludin, would be less of a material witness as well, seeing that she was not privy to the negotiations that led to the conclusion of the two agreements and the subsequent payments which had all along come from the instructions of Dato' Edison D'Cruz and the various letters to the plaintiff requesting for extension of time to pay signed by Dato' Edison D'Cruz.

Whether The Defendant Did Inform The Plaintiff About The Termination Of The Two Agreements

[40] The defendant submitted that the STC agreement was terminated on 18 August 2009 and the CSM agreement was terminated on 29 September 2006. The defendant further submitted that the plaintiff had full knowledge of the termination of both the agreements. The defendant said that this is proven from the fact that the plaintiff wrote to the management of STC and CSM to find out about the new operators of the car park.

[41] The plaintiff on the other hand contended that the plaintiff was never informed of the cessation of the said car parks project. DW1 Sarina confirmed that there was no document or letter from the defendant to the plaintiff evidencing the alleged cessation of business. The plaintiff through PW1 testified that though he did write to the STC and CSM, he did not receive any reply from them.

[42] I can accept the reason advanced by the plaintiff as to why the defendant failed to inform the plaintiff of the defendant's ceasing business of operating the car park if indeed it had ceased to operate the car parks. It was a term of the STC agreement and by extension the CSM agreement as well, that the working capital shall become due and payable upon the defendant ceasing its business.

[43] PW1, Mr Carlo Allaria, gave evidence that as late as 21 February 2010, when he exited from the STC in his car, he was given a ticket with the handwritten date and amount of RM6.50 paid and a signature written on the ticket bearing the name Auto Parking Inc. Sdn Bhd with a serial number 21602. There were also other tickets tendered by him in a document marked as ID1 and these were all tickets bearing the name Auto Parking Inc dated as follows with the various car parks: 21 February 2010 from Subang Sheraton Hotel Car Park,

27 February 2010 from Sri Pelangi Muar Car Park, 21 February 2010 from Gleneagle's Car Park and 23 February 2010 from Plaza Cygal Car Park. It was initially marked as ID1 and I invited counsel for both sides to submit on whether the tickets can be admitted as evidence.

[44] PW1 had also taken photographs of the STC car park where the words "Auto Parking Inc" appear in the parking sign board and the rate stated as RM6.50 per entry. The court can accept this as what he saw recently when he was at the car park at STC.

[45] The court can accept as an exhibit the parking ticket showing the words "Auto Parking Inc Sdn Bhd" on the ticket. It comes within the meaning of real evidence under the Evidence Act 1950. I find the following passage in *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 10 CLJ 491 at pp. 498-500 most helpful in the dicta of his Lordship Hamid Sultan JC (as he then was):

> The learned author *Sarkar on Evidence* (14th edn) vol. 1 defines it as:
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> Again evidence is either real or personal. By real evidence is meant evidence of which, any object belonging to the class of things, is the source, person also being included, in respect of such properties as belong to them in common with things. This sort of evidence may be either immediate, where the thing comes under the cognizance of our senses: or reported, where its existence is related to us by others. Personal evidence is that which is afforded by a human agent, either in the way of discourse or by voluntary signs. Evidence supplied by observation of involuntary changes of countenance and deportment comes under the head of real evidence.
>
> It must be emphasized when a document is marked as exhibit as real evidence on the grounds it is in possession of the parties, you cannot rely on the contents, until and unless the content is proved according to law. This distinction must always be kept in mind.
>
> Under this concept, court may allow a document to be marked which is in the possession of the parties but give no weight or value to its contents. The methodology of enclosures and exhibits are procedural devices widely in practice in courts. Such procedural methodology is nowhere found in any statutes. As long as there is no prejudice to any parties or is not in breach of evidential

rules at the end of the case the court has some discretion to admit the documents but reject its contents if not proved accordingly to law. Support for what I have said can be found in piece meal basis in a number of cases. In *Victoria Insurance Co. Ltd. v. Aik Teong Trading Co.* [1972] 1 LNS 162 Chan Mit Tat J (as His Lordship then was) was of the view that s. 60 of the EA 1950 requires all evidence to be direct evidence. On the facts the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

It must be asserted here that document may be hearsay but oral evidence may be given without breaching the best evidence rule. Section 60 of EA 1950 states:

(1) Oral evidence shall in all cases whatever be direct, that is to say:

(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(b) if it refers to a fact which could be heard; it must be the evidence of a witness who says he heard it;

(c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

(2) The opinions of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held may be proved by the production of the treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing including a document, the court may, if it thinks fit, require the production of that material thing or the document for its inspection.

Section 60 EA 1950 reflects the best evidence rule in respect of oral evidence. The word 'direct' will mean original evidence ie, the evidence of one who has personal knowledge as opposed to second hand information or hearsay evidence. Under this section

oral evidence must be direct ie, the testimony must be of the person who perceived the fact through the medium of his own senses. This section emphasises that evidence should always be direct because direct evidence is the best evidence. Hearsay evidence under this section must be rejected. Hearsay evidence is mainly rejected for the following reasons namely: (a) it is not the best evidence; (b) it is not made on oath; (c) it cannot be tested by cross-examination; (d) the court has no opportunity for watching the demeanor of the person making the statement; (e) admission of hearsay evidence will allow the opportunity for commission of fraud; (f) there is a depreciation of truth in the process of repetition; (g) the court may have to waste its time in listening to idle gossip or rumour. However there are number of exceptions to hearsay rule (see ss. 17 to 39 and 73A EA 1950). If the rules permit the admissibility of hearsay evidence, it is based on the grounds of necessity rather than precision. The probative value of such evidence must be very much less as opposed to direct evidence. (see *Lim Ah Oh & Anor v. Rex* [1950] 1 LNS 36). In *Yousufali v. State of Maharashtra* AIR 1968 SC 147 the Supreme Court of India has held that contemporaneous photographs of the relevant incident are held to be admissible. However the accuracy of such photographs must be proved by calling the photographer or any other person who has direct knowledge of its accuracy. In *Mohd Nazari bin Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601 Augustine Paul JC (as he then was) has dealt with the relevant issues extensively in an articulate manner and in crux His Lordship's view as I understand is that a document can be admitted under any label but if the party wants to rely on the truth of its contents when it is disputed by the other party, it needs to be proved according to law.

[46] The defendant witness DW1 had every opportunity to explain away the fact that the defendant's name should not have appeared in the car park ticket from STC as it was no longer operating the car parks in question but did not. At any rate, quite apart from the car park ticket, the evidence of PW1, Mr Carlo with respect to what he saw on the ticket which was given him at the exit of the car park is admissible as evidence.

[47] In any event the plaintiff is only claiming with respect to the STC car parks until the end of October 2009 as the winding up order on the defendant was made on 18 November 2009. In the absence of any letter from the defendant informing the plaintiff that the defendant had ceased operation of the STC car parks on 18 August 2009, I allowed the plaintiff's claim based on the guarantee payment of RM15,000 per month until October 2009.

The plaintiff could not claim beyond the winding up order date as clearly stated in the case of *Majlis Amanah Ra'ayat v. The Official Receiver, Malaysia* [1984] 1 CLJ 76; [1984] 1 CLJ (Rep) 240, where the Federal Court stated at p. 242:

> It is clear therefore that the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of Court is the date of the order of winding-up.

[48] This is in spite of the fact that there appears to be evidence from the car park tickets that the defendant seemed to be still in operation of the STC car parks even after winding order has been made. If so, all payments collected have to go to the Director General of Insolvency for the benefit of all creditors.

[49] As for the termination of the CSM agreement which the defendant contended was on 29 September 2006, again there was no evidence that the defendant had ever informed the plaintiff about this. The defendant had not been able to produce any letter to the plaintiff on their ceasing business of the operation of the car parks in Menara CSM. The defendant sought to introduce a letter from the defendant to one Jaya Section 14 Sdn Bhd dated 29 September 2006 stating that it intended to terminate the tenancy of the car parks effective 1 October 2006.

[50] The plaintiff in cross-examination of DW1 produced two affidavits affirmed by Dato' Edison D'Cruz on 6 October 2006 and 22 November 2006, both filed in opposing the plaintiff's application for summary judgment and nowhere in the said affidavits did the defendant exhibit the said letter of 29 September 2006 if indeed that letter was sent to the landlord to terminate the car park business at Menara CSM. DW2 could not give a satisfactory answer. The deponent Dato' Edison as stated did not come to give evidence on behalf of the defendant.

[51] In the absence of any evidence showing that the defendant had informed the plaintiff of the cessation of the car park business at Menara CSM, I allowed the plaintiff's claim of RM7,250 per month from December 2005 until August 2009 by which time, both parties agreed that the building had been demolished for redevelopment.

Other Issues

[52] The defendant had also raised the fact that the two agreements were joint-venture agreements as recital (B) had stated that the defendant was desirous of forming a joint venture project to operate the business in accordance with the letter of award issued by the STC dated 28 July 2003 awarding to the defendant the right to operate a car park at the STC. It was an investment agreement where the returns would be dependent on the profits generated and the share of it in the 25%:75% ratio as between the plaintiff and the defendant with the attendant risks involved with a possibility of negative returns. However that is not borne out by the clear words of the agreements. There is nothing wrong with negotiating in a joint venture a minimum guaranteed profits or returns or payments every month and more so when the STC agreement provided by cl. (d) that there will not be any further requirements of working capital other than the initial amount of RM210,000.

[53] It was also contended that as the STC agreement was entitled shareholders agreement and that the plaintiff was to have subscribed to 25% of the share capital in the defendant, then the relationship is that of a pure investor who might lose all his investment. The fact as accepted by both the parties is that no shares were ever issued to the plaintiff and neither was the plaintiff made a director of the defendant. It was the evidence of DW1 that PW1 did not participate at all in the management of the defendant.

[54] I therefore cannot agree with the defendant's alternative argument that the issue as to whether the defendant had informed the plaintiff of the termination of the two agreements is not relevant here as both the agreements are purely an investment and that termination of the same would not affect the plaintiff in any way as it is only entitled for the profit if the defendant's company made a profit.

[55] There was also initially the issue as to whether the plaintiff was entitled for the refund of RM210,000 under the STC agreement and RM174,000 under the CSM agreement, as this was never pleaded and/or prayed for by the plaintiff in their statement of claim. The plaintiff's counsel rightly and readily conceded that it had not been so pleaded and that indeed the relevant material facts had not been pleaded to support a refund of the two sums paid as working capital. To allow such a claim

would also run foul of the Companies Act 1965 where, once a company has been wound up, no refund of a capital payment may be made. It is apposite to quote here the salutary words of his Lordship Hamid Sultan JC (as he then was) in *Recaliva Design Steel*'s case *(supra)* at p. 496:

> ... the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concerned what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings.

[56] There was also another issue raised by the defendant in that the plaintiff's witness testified that in fact the plaintiff had received more profits than what the plaintiff had invested.

[57] It was pointed out by the defendant that DW1 also testified that for the STC agreement, the plaintiff had invested RM384,000 for both the agreement (RM210,000-STC and RM174,000-CSM) and the total return paid by the defendant to the plaintiff is RM515,389.04. I can only say that if the intention was otherwise then the defendant could have limited the payments to the plaintiff to a certain fixed period maybe until the expiry of the initial five-year period for the STC agreement for example and the defendant would not have to complain now that the plaintiff is now getting more than it had bargained for. The truth of the matter is that as the defendant had been wound up any judgment now entered for the plaintiff would probably be a paper judgment, not counting the additional costs incurred by the plaintiff in pursuing the matter to the Court of Appeal and back to the High Court again for trial by which time the defendant had been wound up on 18 November 2009.

[58] There is also the issue that the conduct of the defendant in paying the guaranteed profit under the two agreements would be such that it is now estopped from contending that payments would only be made when there is profit. The plaintiff was paid RM15,000 per month for the period October 2003 to May 2005 (pp. 66-77 of bundle B). The plaintiff was paid based on 50% of the profits per month for the period January 2004 to June 2005 under the CSM agreement (pp. 37-64 of bundle B). A summary of the payments made is found at p. 65 of bundle B.

[59] In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283 Gopal Sri Ram JCA (as His Lordship then was) sitting in the Federal Court held at p. 294:

> The time has come for this court to recognize that the doctrine of estoppels is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless

[60] In fact by forwarding the three post-dated cheques by its cover letter of 4 January 2006 (p. 19 bundle B) the defendant had confirmed and admitted to the plaintiff claim of RM126,250 as the amount due then and the contention that the defendant need to pay the monthly payment only if there is profit was never pleaded in the defendant's statement of defence. If it were so important a term that would be a complete defence to the plaintiff's claim, surely the defendant would have pleaded it in clear and unmistakable language.

[61] The plaintiff had summarised its claims as follows:

STC	CSM			
June-Nov 2005	July-Nov 2005	3 post dated cheques		RM126,250.00
		1 cheque cleared		RM 42,000.00
				RM 84,250.00
		Court of Appeal Order (RM84,250.00 + RM21,512.60 dishonoured cheques + interest + costs)		
				RM 21,512.60
				RM105,762.60
		1 cheque cleared		RM 52,881.00
				RM 52,881.60
Dec '05	RM 15,000.00	Dec '05	RM7,250.00	
Jan-Dec '06	RM180,000.00	Jan-Dec '06	RM 87,000.00	RM 705,000.00
Jan-Dec '07	RM180,000.00	Jan-Dec '07	RM 87,000.00	RM 326,250.00
Jan-Dec '08	RM180,000.00	Jan-Dec '08	RM 87,000.00	**RM1,084,131.60**
Jan-Oct '09	RM150,000.00	Jan-Aug '09	RM 58,000.00	
Total	RM705,000.00		RM326,250.00	

A **Pronouncement**

[62] Based on all the matters considered above, I allowed judgment to be entered against the defendant in liquidation for the sum of RM1,084,131.60. Interest shall be at the rate of 8% per
B annum from date of writ until realisation. Effectively the interest shall be until the date of the winding up order ie, 18 November 2009 as the company had been wound up on that day. See the case of *Foo Sey Koh & Ors v. Chua Seng Seng & Ors* [1985] 1 LNS 66 where the discretion of the court on interest is
C concerned. I also ordered costs of RM20,000 from defendant in liquidation to plaintiff.

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